No. 86-87 (9)

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Petitioner,

—v.—

ANTHONY SALERNO AND VINCENT CAFARO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO *AMICUS CURIAE* BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION AND ACLU FOUNDATION OF SOUTHERN CALIFORNIA IN SUPPORT OF RESPONDENTS

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EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, vs. ROBERT WALKER, Defendant-Appellee.	No. 86-5264 DC#CR-86-1134M-AWT Central California
UNITED STATES OF AMERICA, Plaintiff-Appellant, vs. DUON WALKER, Defendant-Appellee	No. 86-5272 DC#CR-86-1133M-AWT Central California ORDER

Before: KOELSCH, ANDERSON and HALL, Circuit Judges

We find preventive detention under the Bail Reform Act of 1984, 18 U.S.C. § 3142(f), to be constitutional.

Appellant's motion for revocation of the release orders is granted. An opinion will follow.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 86-5273
Plaintiff-Appellant,	DC#CR-86-1139-AWT
vs.	
SANTIAGO CORTEZ RIVAS,	ORDER
Defendant-Appellee.	

Before: KOELSCH, ANDERSON and HALL, Circuit Judges

We disagree with the district court's factual finding that appellee poses a danger to the community.

Appellant's motion for revocation of the release order is denied. The case is remanded to the district court for appropriate conditions of release. U.S.C. § 3142(b) & (c).

EXHIBIT B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DUAN WALKER, Defendant.	NO. 86-1133M
UNITED STATES OF AMERICA, Plaintiff, v. ROBERT WALKER, Defendant.	NO. 86-1134M
UNITED STATES OF AMERICA, Plaintiff, v. SANTIAGO CORTEZ RIVAS, Defendant.	NO. 86-1139M MEMORANDUM ORDER ON REVIEW OF MAGISTRATE'S ORDER OF PERMANENT DETENTION

Each of these three cases is before the Court, sitting as the Criminal Duty Judge, pursuant to 18 U.S.C. §3145(b), on motions by the respective defendants for revocation of permanent orders of detention issued by a magistrate after hearing under 18 U.S.C. § 3142(i). In each case, the detention order is based only on the finding that "no condition or combination of conditions will reasonably assure . . . safety of any person or the community." And the government seeks affirmance of the detention orders solely on the basis of danger to the community.

No indictment has been returned in any of these cases. Defendant Duan Walker is charged in a criminal complaint with possession with intent to distribute of six kilograms of cocaine, in violation of 21 U.S.C. §841(a)(1). Defendant Robert Walker is charged in a complaint with conspiracy to distribute one kilogram of cocaine, in

violation of 21 U.S.C. §846. The affidavit in support of these complaints show that each defendant was armed. Defendant Rivas is charged by complaint with one count of bank robbery. 18 U.S.C. §2113(a). The proffered testimony of the investigating FBI agent is that Rivas committed numerous other bank robberies, as many as eight during a one-month period, and he was addicted to heroine and cocaine.

Detention was sought and ordered in these cases under §3142(f)(1)(C) with respect to both Walkers -- that 10+ year drug offenses were charged -- and under §3142(f)(1)(A) with respect to Rivas -- that "a crime of violence" was charged, as defined in §3156(a)(4). In each of these cases, considering the weight of the evidence against the defendant, his history and characteristics, the nature and circumstances of the offenses charged (including the

prescence of loaded firearms in the cases of the Walkers) (including the continued string of robberies by a drug addict in the case of Rivas) and that the offenses involved are either narcotic drug charges or crimes of violence, and the nature and seriousness of the danger to the community posed by each defendant's release, I find by clear and convincing evidence, on de novo review, that no condition or combination of conditions would reasonably assure the safety of the community if any of these defendants is released pending trial. §3142(e), (f) & (g). I agree with the magistrate that in none of these cases do the facts support a finding of likelihood of flight. The government does not contend that no condition or combination of conditions will reasonably assure the appearance of any defendant for trial.

The Court, thus, must confront the facial constitutional challenge made to §3142(e) by defendant Rivas. (Because the review of the Walkers' detention orders were before me at the same time, I cannot apply a different constitutional standard to their cases.)

Rivas contends that §3142(e) violates substantive due process, insofar as it permits pretrial detention of a defendant on the sole ground that his release poses a danger to any person or the community. As explained briefly below, I must agree with this contention; therefore, appropriate release orders will be issued in each case.

This Circuit has never confronted the issue. It has held the Bail Reform Act of 1984 constitutional in a different context -- that "pretrial detention based on risk of flight" does not violate the due process clause of the Fifth Amendment. United

States v. Winsor, 785 F.2d 755, 756 (9th Cir. 1986) (per curiam). See also United States v. Kouyoumdjian, 601 F.Supp. 1506 (C.D. Cal. 1985) (same); United States v. Freitas, 602 F.Supp. 1283,1291 (N.D. Cal. 1985) (not distinguishing between Act's goals of "safety of the community or the appearance of the defendant at trial"). The circuits which have directly addressed the issue are split. At least one circuit has clearly held that pretrial detention under §3142(e) reasonably to assure safety of the community does not violate substantive due process. United States v. Perry, 788 F.2d 100, 113 (3d Cir. 1986). See also United States v. Portes, 786 F.2d 758, 767 (7th Cir. 1986) (holding that substantive due process not violated; however, opinion does not make clear distinction between danger to community and risk of flight, both of which were involved).

On the other hand, the Second Circuit recently held to the contrary, that pretrial detention solely on the ground of danger to the community violates substantive due process, without regard to the probable length of that detention. United States v. Salerno, 794 F.2d 64, 71-75 (2d Cir. 1986). See also United States v. Melendez-Carrion, 790 F.2d 984, 998-04 (2d. Cir. 1986) ("plurality" opinon of Newman, J.) (same).

It is neither necessary nor useful for this Court to add further words to this debate, I am faced with the choice and must decide. I believe that the Second Circuit articulates the sounder constitutional view. I add only a word concerning Schall v. Martin, 467 U.S 253 (1984), although it is extensively discussed in all the cases, because it was heavily relied on by the government at the hearing. The constitutionality of pretrial detention in

these cases based solely on danger to the community cannot be bottomed on Schall. Its holding that pretrial detention of juveniles based on a finding of serious risk of the commission of another crime is based on one of the basic concepts of our society which has no application to adults. "The State has 'a parens patriae interest in preserving and promoting the welfare of the child,' which makes a juvenile proceeding fundamentally different from an adult criminal trial." Id. at 263 (citation omitted).

For the reasons articulated in Salerno, I hold that §3142(e) is unconstitutional in that it violates the Fifth Amendment's guarantee of substantive due process, to the extent that it authorizes the pretrial detention of an adult criminal defendant solely on the ground that "the safety of any other person and the community" cannot reasonably be assured. Appropriate release

orders will be issued in each case. The orders shall be stayed for a period of five (5) days to enable the government to seek appellate review, §3145(c), or a further stay pending appeal.

Dated: September 11, 1986

/signed/
A. WALLACE TASHIMA
United States
District Judge

CARL GUNN-DFPD

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DUAN WALKER, Defendant.	NO. 86-113M AWT
UNITED STATES OF AMERICA, Plaintiff, v. ROBERT WALKER, Defendant.	NO. 86-1134M AWT
UNITED STATES OF AMERICA, Plaintiff, v. SANTIAGO CORTEZ RIVAS, Defendant.	NO. 86-1139M AWT SUPPLEMENTAL MEMORANDUM

This brief memorandum supplements the Memorandum Order on Review of Magistrate's Order of Permanent Detention, filed September 11, 1986. The Biweekly Custody Report referred to below is ordered filed under seal in No. 86-1139M AWT, subject to the right of counsel in each of these cases to have access to the sealed report.

It has been argued that it is inappropriate to question the constitutionality of pretrial detention without regard to the period of confinement because, inter alia, Congress, through the Speedy Trial Act, has insure that pretrial detention will be only for a minimal period. See, e.g., United States v. Melendez-Carrion, 790 F.2d 984, 1012 (2d Cir. 1986) (Timbers, J., dissenting); United States v. Accetturo, 783 F.2d 382, 387 (3d Cir. 1986). The experience in this district belies that contention.

As the Criminal Duty Judge, I have reviewed since July, 1986, the "Bi-Monthly [sic] Report of Defendants of California" (the "Biweekly Custody Report"), prepared by the United States Attorney and transmitted to the Criminal Duty Judge pursuant to F. R. Crim. P. 46(g). The latest such report is dated September 19, 1986, and lists all pretrial detainees as of September 17, 1986. I take judicial notice of this report, which is typical of prior reports.

I have reviewed the Biweekly Custody Report and made certain adjustments thereto. The adjustments made are deletions of: (1) material witnesses; (2) defendants awaiting a change of plea or subsequent proceedings, such as sentencing or appeal; and (3) those in state custody on other charges i.e., the adjustments are to reflect defendants awaiting trial or otherwise in a pretrial status. After such adjustments, the

report shows that there are 187 pretrial detainees in this district. Of that number, 51, or 27 percent, have been in custody for more than 70 days, i.e., their initial custody date predates July 9, 1986. Of the 51, 80 percent (41 detainees) have been in pretrial custody for more than six months, including two who have been in pretrial detenion for nearly one year (since October 10 & 11, 1985). Thus, it cannot realistically be contended that the Speedy Trial Act works evenly to insure that pretrial detention will be of such a short duration so as not to constitute punishment. Bell v. Wolfish, 441 U.S. 520, 535-40 (1979).

Dated: September 22, 1986

/signed/
A. WALLACE TASHIMA
United States
District Judge

EXHIBIT C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. [ROBERT WALKER] Defendant.	[86-1434m2] ORDER OF DETENTION AFTER HEARING (18 U.S.C. 3142(i))

A. ([X]) On motion of the Government involving an alleged

1. ( ) crime of violence;

2. ( ) offense with maximum sentence of life imprisonment or death;

[Note: Throughout Exhibit C, material enclosed within brackets, e.g., [. . .], appeared in handwritten form in the original. Full-sized copies of the originals have been lodged with the Court.]

3. ( ) narcotics or controlled substance offense with maximum sentence of ten or more years (21 U.S.C. §§801,/951, et. seq.,/955a);

4. ( ) felony - defendant convicted of two or more prior offenses described above.

B. On motion ([X]) (by the Government)/( ) (by the Court sua sponte involving)

1. ([X]) serious risk defendant will flee;

2. ( ) serious risk defendant will

a. ( ) obstruct or attempt to obstruct justice;

b. ( ) threaten, injure, or intimidate a prospective witness or juror or attempt to do so.

[3. (X) danger to community]

II.

The Court finds no condition or combination of conditions will reasonably assure:

A. ( ) appearance of defendant as required;

and/or

B. ([X]) safety of any person or the community;

III.

The Court has considered:

A. ([X]) the nature and circumstances of the offense;

B. ([X]) the weight of evidence against the defendant;

C. ([X]) the history and characteristics of the defendant;

D. ([X]) the nature and seriousness of the danger to any person or to the community.

IV.

The Court concludes:

A. ( ) Defendant poses a risk to the safety of other persons or the community because: [drug dealing in possession of guns]

B. ( ) History and characteristics indicate a serious risk that defendant will flee because:

_____

_____

_____

_____

C. ( ) A serious risk exists that defendant will:

1. ( ) obstruct or attempt to obstruct justice;

2. ( ) threaten, injure or intimidate a witness/juror

3. ( ) attempt to threaten, injure or intimidate a witness/juror;

Because: _____

_____

_____

_____

D. ( ) Defendant has not rebutted by sufficient evidence to the contrary the presumption provided in 18 U.S.C. §3142(e).

IT IS ORDERED defendant be detained prior to trial.

IT IS FURTHER ORDERED that defendant be confined as far as practicable in corrects facility separate from persons awaiting or serving sentences or persons held pending appeal.

IT IS FURTHER ORDERED that defendant be afforded reasonable opportunity for private consultation with his counsel.

DATED: 9-5-86

/signed/
U.S. MAGISTRATE/DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. [DUAN WALKER] Defendant.	ORDER OF DETENTION AFTER HEARING (18 U.S.C. §3142(i))

I.

A. ([X]) On motion of the Government involving an alleged

1. ( ) crime of violence;

2. ( ) offense with maximum sentence of life imprisonment or death;

3. ([X]) narcotics or controlled substance offense with maximum sentence of ten or more years (21 U.S.C. §§801,/951, et. seq.,/955a);

4. ( ) felony - defendant con prior offenses describ

B. On motion ([X]) (by Government)/( ) (by the Court sua sponte involving)

1. ([X]) serious risk defendant will flee;

2. ( ) serious risk defendant will

a. ( ) obstruct or attempt to obstruct justice;

b. ( ) threaten, injure, or intimidate a prospective witness or juror or attempt to do so.

[3. (X) danger to community]

II.

The Court finds no condition or combination of conditions will reasonably assure:

A. ( ) appearance of defendant as required;

and/or

B. ([X]) safety of any person or the community;

III.

The Court has considered:

A. ([X]) the nature and circumstances of the offense;

B. ([X]) the weight of evidence against the defendant;

C. ([X]) the history and characteristics of the defendant;

D. ([X]) the nature and seriousness of the danger to any person or to the community.

IV.

The Court concludes:

A. ([X]) Defendant poses a risk to the safety of other persons or the community because: [possession of guns by narcotic dealer.]

B. ( ) History and characteristics indicate a serious risk that defendant will flee because: _____

_____

_____

_____

_____

C. ( ) A serious risk exists that defendant will:

1. ( ) obstruct or attempt to obstruct justice;

2. ( ) threaten, injure or intimidate a witness/juror

3. ( ) attempt to threaten, injure or intimidate a witness/juror;

Because: _____

_____

_____

_____

D. ( ) Defendant has not rebutted by sufficient evidence to the contrary the presumption provided in 18 U.S.C. §3142(e).

IT IS ORDERED defendant be detained prior to trial.

IT IS FURTHER ORDERED that defendant be confined as far as practicable in a corrections facility separate from persons awaiting or serving sentences or persons held pending appeal.

IT IS FURTHER ORDERED that defendant be afforded reasonable opportunity for private consultation with his counsel.

DATED: [9-5-86]

/signed/
U.S. MAGISTRATE/DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff.	[86-1139m]
v.	ORDER OF DETENTION AFTER HEARING
[SANTIAGO CORTZ RIVAS] Defendant.	(18 U.S.C. §3142(i))

I.

A. ([X]) On motion of the Government involving an alleged

1. ([X]) crime of violence;

2. ( ) offense with maximum sentence of life imprisonment or death;

3. ( ) narcotics or controlled substance offense with maximum sentence of ten or more years (21 U.S.VC. §§801,/951. et. seq.,/955a);

4. ( ) felony - defendant convicted of two or more prior offenses described above.

B. On motion ([X]) (by the Government)/( ) (by the Court sua sponte involving)

1. ([X]) serious risk defendant will flee;

2. ( ) serious risk defendant will

a. ( ) obstruct or attempt to obstruct justice;

b. ( ) threaten, injure, or intimidate a prospective witness or juror or attempt to do so.

[3. (X) danger to community.]

II.

The Court finds no condition or combination of conditions will reasonably assure:

A. ( ) appearance of defendant as required;

and/or

B. ([X]) safety of any person or the community;

III.

The Court has considered:

A. ([X]) the nature and circumstances of the offense;

B. ([X]) the weight of evidence against the defendant;

C. ([X]) the history and characteristics of the defendant;

D. ([X]) the nature and seriousness of the danger to any person or to the community.

IV.

The Court concludes:

A. ( ) Defendant poses a risk to the safety of other persons or the community because: [serious narcotic addiction plus government alleges defendant is suspect in series of bank robberies.]

B. ( ) History and characteristics indicate a serious risk that defendant will flee because: _____

_____

_____

_____

_____

C. ( ) A serious risk exists that defendant will:

1. ( ) obstruct or attempt to obstruct justice;

2. ( ) threaten, injure or intimidate a witness/juror;

3. ( ) attempt to threaten, injure or intimidate a witness/juror;

Because: _____

_____

_____

_____

D. ( ) Defendant has not rebutted by sufficient evidence to the contrary the presumption provided in 18 U.S.C. §3142(e).

IT IS ORDERED defendant be detained prior to trial.

IT IS FURTHER ORDERED that defendant be confined as far as practicable in a corrections facility separate from persons awaiting or serving sentences or persons held pending appeal.

IT IS FURTHER ORDERED that defendant be afforded reasonable opportunity for private consultation with his counsel.

DATED: [9-4-86]

/signed/
U.S. MAGISTRATE/DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. [HECTOR HERMAN HOYOS] Defendant.	[86-1269M-8] ORDER OF DETENTION AFTER HEARING (18 U.S.C. §3142(i))

I.

A. ([X]) On motion of the Government involving an alleged

1. ( ) crime of violence;

2. ( ) offense with maximum sentence of life imprisonment or death;

3. ([X]) narcotics or controlled substance offense with maximum sentence of ten or more years (21 U.S.C. §§801,/951, et. seq.,/955a);

4. ( ) felony - defendant convicted of two or more prior offenses described above.

B. On motion ( ) (by the Government)/( ) (by the Court sua sponte involving)

1. ( ) serious risk defendant will flee;

2. ( ) serious risk defendant will

a. ( ) obstruct or attempt to obstruct justice;

b. ( ) threaten, injure, or intimidate a prospective witness or juror or attempt to do so.

II.

The Court finds no condition or combination of conditions will reasonably assure:

A. ([X]) appearance of defendant as required;

and/or

B. ([X]) safety of any person or the community;

III.

The Court has considered:

A. ([X]) the nature and circumstances of the offense;

B. ([X]) the weight of evidence against the defendant;

C. ([X]) the history and characteristics of the defendant;

D. ([X]) the nature and seriousness of the danger to any person or to the community.

IV.

The Court concludes:

A. ([X]) Defendant poses a risk to the safety [_____][1] of the community because: The presumption.

B. ([X]) History and characteristics indicate a serious risk that defendant will flee because: [likelihood of commitment and lengthy incarceration; citizenship and ties abroad]

C. ( ) A serious risk exists that defendant will:

[1] The words "other persons or" were here crossed out by the district court.

1. ( ) obstruct or attempt to obstruct justice;

2. ( ) threaten, injure or intimidate a witness/juror

3. ( ) attempt to threaten, injure or intimidate a witness/juror;

Because: _____

_____

_____

_____

D. ([X]) Defendant has not rebutted by sufficient evidence to the contrary the presumption provided in 18 U.S.C. §3142(e).

IT IS ORDERED defendant be detained prior to trial.

IT IS FURTHER ORDERED that defendant be confined as far as practicable in a corrections facility separate from persons awaiting or serving sentences or persons held pending appeal.

IT IS FURTHER ORDERED that defendant be afforded reasonable opportunity for private consultation with his counsel, [Mr. Kelly.]

DATED: [9/30/86]

/signed/
U.S. MAGISTRATE/DISTRICT JUDGE